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10/643,238	08/18/2003	David C. Streuli	FDN-2746	3286

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INTERNATIONAL SPECIALTY PRODUCTS

Attn: William J. Davis, Esq.
Legal Dept., BLDG.10
1361 Alps Road
Wayne, NJ 07470

EXAMINER

GOLLAMUDI, SHARMILA S

ART UNIT	PAPER NUMBER
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1616

DATE MAILED: 12/13/2006

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/643,238
Filing Date: August 18, 2003
Appellant(s): STREULI ET AL.

Walter Katz
Registration Number 19,706
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 19, 2006 appealing from the Office action mailed April 19, 2006.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner.

The rejection of claims 2-4 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is withdrawn.

NEW GROUND(S) OF REJECTION

Claims 2-4 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 4 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,752,983	DOBBS et al	6-2004
6,214,328	CHANG et al	4-2001
422,068	INT. SPECIALITY PROD.	6-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

A) Claims 2-4 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. This is a new ground of rejection.

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Claim 2 has been amended to recite 50/50 wt./wt. mixture of propane/isobutene, which does not have support in the originally filed claims or specification. Applicant has support for isobutane not isobutene.

B) Claim 4 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. This is a new ground of rejection.

Claim 4 is directed to the “composition of claim 2, which *further includes* one or more of a cationic polymer or cationic surfactant, a corrosion inhibitor, or a silicone selected from phenyl trimethicone and cyclopentasiloxane.” Claim 4 depends on independent claim 2, which recites “consisting essentially of” claim language wherein the claim language excludes materials that would materially effect the composition. The examiner points out that cationic polymers and silicones are materials that would materially affect the composition. Thus, claim 4 is indefinite since a skilled artisan would not know the metes and bounds of the claim since it is unclear as to what is included and excluded, i.e. what is essential to the invention and what is unessential.

C) Claims 2-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dobbs et al (6,752,983) in view of RD 422068.

Dobbs teaches a hair spray with reduced volatile organic compounds. Dobbs teaches the Environmental Protection Agency (EPA) has mandated a reduction in the VOC content of hair sprays to 80% or less by 1998. The state of California has set an even more stringent requirement for VOCs in hair spray than the EPA, limiting VOCs to 55% by June 1999. Further, Dobbs teaches propellants such as dimethylether, isobutane, and propane and solvents such as ethanol are VOCs (volatile organic compounds) and must be considered as such in the hair spray

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formulations in which they are used. Dobbs teaches that to lower the VOC content of the spray, many manufacturers have replaced ethanol in their sprays with water. However, an increase in the water concentration can adversely affect the performance of the hair spray by accelerating the initial curl droop and/or increasing the dry time on the hair. See column 1.

Dobbs teaches a composition comprising a fixative, ethanol, and methyl acetate and/or t-butyl acetate, a propellant, and optionally water. Preferably the composition comprises: (a) **from about 1 to about 10% fixative**; (b) **from about 20 to about 75% ethanol**; (c) from about 1 to about 60% acetate (methyl acetate and/or t-butyl acetate); and (d) **from about 15 to about 45% propellant**. More preferably the composition comprises from about 2 to about 8% fixative and from about 20 to about 35% propellant. The above formulations may also contain water, which preferably comprises from **about 0.01 to about 45%** of the composition, and more preferably from about 0.01 to about 30% of the composition. See column 6, lines 15-35.

Dobbs teaches the manipulation of the concentrations of each component. For instance, the lower end of ethanol may be 25%, 30%, 35%, 40%, 45%, or 50%. Dobbs teaches the endpoints of acetate and ethanol weight percentages can be selected and combined in any combination that is mathematically possible, and can be combined with the preferred or more preferred fixative, propellant, and water weight ranges. For example, in a more preferred embodiment, the compositions of this invention comprise from about 20 to about 55 weight % ethanol; from about 10 to about 40 weight % methyl acetate; from about 4 to about 8 weight % fixative; and from about 20 to about 35 weight % propellant. See column 6, lines 36-62.

Dobbs teaches an "organic solvent-based" formulation refers to a formulation in which the ingredients are soluble, dispersible, or miscible in an organic solvent. The organic solvent

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preferably does not exceed 55% of the composition (instant VOC) (See column 5, lines 40-45).

Water can be present in such formulations, but typically at concentrations **no more than 15 % water**. A "water solvent-based" formulation refers to a formulation in which the ingredients are soluble, dispersible, or miscible in water or a water/organic solvent mixture. Organic solvents may also be present in such formulations, typically at any level. However, the organic solvents preferably do not exceed 55 weight % of the formulation.

Dobbs teaches suitable propellants include propane, isobutane, n-butane, dimethyl ether (hydrocarbon), **1,1-difluoroethane** (hydrofluorocarbon), 1,1,1,2-tetrafluoroethane, and mixtures thereof. In one particularly preferred embodiment the propellant comprises 1,1-difluoroethane (hydrofluorocarbon). In an organic solvent-based systems, a mixture of propane and isobutane is preferred. The propellant preferably comprises from about 5 to about 50 parts by weight propane and from about 50 to about 95 parts by weight isobutene (meets 50/50 wt mixture of propane and isobutane. If any water is present in the formulation, then the propellant system also preferably comprises, in addition to propane and butane, dimethyl ether or one of the hydrofluorocarbons (HFC) discussed above. See column 8, lines 45-61. Note that this is a suggestion of instantly claimed isobutane, propane, and HFC. Example 9-10 teaches Dymel A in an amount of 30% and 35% respectively. Example 11 teaches 20% A-46 as the propellant (a isobutane and propane mixture).

Dobbs teaches the inclusion of other conventional additives such as preservatives, fragrances, antifoaming agents, hair conditioners, detackifiers, **corrosion inhibitors**, wetting agents, emulsifiers, gloss enhancers, and plasticizers may be added in quantities as desired, up to

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about 5% by weight of the total formulation. Dobbs teaches any fixative polymer that is commercially available and routinely used in the art may be used. See column 8, lines 62-65.

Dobbs does not teach the instant isobutylene/ethylmaleimide/hydroxyethylmaleimide copolymer as the hair fixative.

RD '068 teaches AQUAFLEX FX-64 (isobutylene/ethylmaleimide/hydroxyethylmaleimide) as a new hair styling polymer that is environmentally friendly (formulated for low VOC hair sprays) and may be used in styling products such as mousses, gels, and lotions. The polymer has enhanced styling effects on the hair and easy to incorporate in a composition. See abstract. RD '068 teaches the propellant system comprises isobutane and propane and the propellant is used in an amount of 8%. See example 1.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Dobbs et al and RD '068 and utilize the AQUAFLEX FX-64 in Dobbs hair composition. One would have been motivated to do so since RD '068 teaches the AQUAFLEX FX-64 is a styling polymer that not only has enhanced styling effects but also is environmentally friendly. Thus, a skilled artisan would have expected success by the instant combination since not only does Dobbs teach any hair polymer that is known in the art may be used but Dobbs teaches an environmentally acceptable hair composition with a low VOC and the use of the instant hair fixative would further enhance the environmental acceptability of the composition.

With regard to claim 2, the examiner points out that Dobbs provides the general weight percents of each instantly claimed component. Dobbs teaches (a) from about 1 to about 10 % fixative, which encompasses instantly claimed "about 4% of copolymer"; (b) from about 20 to

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about 75 % ethanol, which encompasses instantly claimed “about 45% ethanol”; (c) from about 15 to about 45 % propellant, which encompasses instantly claimed “about 31% of (a) and about 6% of (b)”; and (d) about 0.01 to about 45 weight % of the composition, more preferably from about 0.01 to about 30 weight % water, which encompasses instantly claimed “about 6-12% of water”. See column 6, lines 15-35. With regard to the propellant system, firstly Dobbs teaches the preference for the use of a mixture of propane in the amount of 5-50% and butane in the amount of 50-95%, which encompasses instantly claimed “50/50 mixture of propane/isobutene”. Further, Dobbs teaches if water is present, then the propellant system preferably comprises, in addition to propane and butane (50-95), dimethyl ether or a hydrofluorocarbons. Thus, it is the examiner's position that the manipulation of concentrations that it is within the skill of an artisan which is done during routine experimentation. Also, the examiner points out that Dobbs teaches the manipulation of the various components on column 6, depending on the other components and their weight percent in the composition. For instance, Dobbs teaches the use of a lower concentration of ethanol, if water and propellant are included in the formulation. Moreover, Dobbs teaches that EPA has mandated the lowering of VOCs in an amount of 80% or less and California mandates limiting VOCs to 55%, thus if a skilled artisan would have been motivated to manipulate the above concentrations within the EPA's guidelines. Furthermore, one would have been motivated to utilize to a lower concentration of water since Dobbs teaches water can adversely effect the curl holding properties of the composition. Lastly, it should be noted that generally difference in concentrations do not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such as concentration is critical. See *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

With regard to the instant claim language, the examiner points out that for the purposes of searching for and applying prior art under 35 U.S.C. 102 and 103, absent a clear indication in the specification or claims of what the basic and novel characteristics actually are, "consisting essentially of" will be construed as equivalent to "comprising." See MPEP 2111.03.

D) Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dobbs et al (6,752,983) in view of RD 422068 in further view of Chang et al (6,214,328).

The teachings of Dobbs et al and RD '068, respectively, have been set forth above, in detail. Dobbs teaches a hair spray with reduced volatile organic compounds. The composition comprises: (a) from about 1 to about 10% fixative; (b) from about 20 to about 75% ethanol; (c) from about 1 to about 60% acetate (methyl acetate and/or t-butyl acetate); and (d) from about 15 to about 45% propellant. More preferably the composition comprises from about 2 to about 8% fixative and from about 20 to about 35% propellant. The above formulations may also contain water, which preferably comprises from about 0.01 to about 45% of the composition, and more preferably from about 0.01 to about 30% of the composition. See column 6, lines 15-35. Dobbs teaches the inclusion of other conventional additives such as preservatives, fragrances, antifoaming agents, hair conditioners, detackifiers, corrosion inhibitors; **wetting agents**, emulsifiers, gloss enhancers, and **plasticizers** may be added in quantities as desired, up to about 5% by weight of the total formulation.

RD '068 teaches isobutylene/ethylmaleimide/hydroxyethylmaleimide. See abstract.

Although Dobbs teaches the use of plasticizers and wettings agents (surfactants), the instant cationic surfactants or silicones are not specified.

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Chang teaches a an aqueous hair styling compositions having a fixative resin and containing low (80 weight percent or less) VOC concentrations. See abstract. Chang teaches one more surfactants may be added to low-VOC hair styling composition, which typically reduce the surface tension of the composition. When surfactants are present in the hair styling composition, they are preferably present at a concentration of from 0.001 to 1%. The surfactants that may be used in the hair styling composition include, for example, anionic, **cationic**, nonionic and amphoteric surfactants. Further, one or more plasticizers may be added to the hair styling composition of the present invention at a concentration of from 0.001 to 1%. The plasticizers include those that are known and typically used in the art such as dimethicone copolyol, dimethicone, **phenyltrimethicones**, and trialkylcitrate. See column 6, lines 42-65.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Dobbs et al, RD '068, and Chang et al and utilize the instantly claimed additives in the hair composition of Dobbs. One would have been motivated to do so since Chang teaches the conventional use of surfactants, such cationic surfactants, to reduce surface tension of the composition. Further, a skilled artisan would have been motivated to use plasticizers such as phenyltrimethicone, since plasticizers modify the flow properties and flexibility of the composition. Lastly, a skilled artisan would have reasonably expected similar results since Dobbs teaches that additives such as wetting agents and plasticizers may be used in the composition without effecting the performance of the composition.

(10) Response to Argument

A) Claims 2-4 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was

not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

This is a new ground of rejection. Accordingly, applicant has not responded.

B) Claim 4 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

This is a new ground of rejection. Accordingly, applicant has not responded

C) Claims 2-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dobbs et al (6,752,983) in view of RD 422068.

Appellant argues that the essential components in Dobbs's composition are methyl acetate and/or butyl acetate solvents. Appellant argues methyl acetate and/or butyl acetate solvents are absent in instant composition by the use of the claim language "consisting essentially of".

In response to the above argument, firstly the examiner respectfully submits that the transitional phrase "consisting essentially of" limits the scope of a claim to the specified materials or steps "and those that do not materially affect the basic and novel characteristic(s)" of the claimed invention. In re Herz, 537 F.2d 549, 551-52,190 USPQ 461, 463 (CCPA 1976). The examiner points out that methyl acetate is a solvent just as ethanol is a solvent. Moreover, as clearly taught by Dobbs, methyl acetate is not a solvent that increases the VOC content since it is "negligibly reactive". See column 2, line 56. Meaning that methyl acetate does not constitute a VOC material and increase the VOC of the final composition. Additionally, on column 7, lines

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2-3 and Table 1, Dobbs teaches the lower limit of methyl acetate may be 1%. Thus, it is the examiner's position that the prior art's methyl acetate is not a material that would change the basic and novel characteristics of the instant invention since clearly the instant invention utilizes a solvents such as ethanol and water.

Secondly, the examiner respectfully points out that MPEP 2111.03 states:

“For the purposes of searching for and applying prior art under 35 U.S.C. 102 and 103, **absent a clear indication in the specification or claims** of what the basic and novel characteristics actually are, "consisting essentially of" will be construed as equivalent to "comprising." See, e.g., PPG, 156 F.3d at 1355, 48 USPQ2d at 1355 ("PPG could have defined the scope of the phrase consisting essentially of" for purposes of its patent by making clear in its specification what it regarded as constituting a material change in the basic and novel characteristics of the invention."). See also AK Steel Corp. v. Sollac, 344 F.3d 1234, 1240-41, 68 USPQ2d 1280, 1283-84 (Fed. Cir. 2003).”

The instant specification does not provide a clear indication that other solvents, such as methyl acetate, are excluded nor does it contemplate the absence of methyl acetate specifically.

The examiner respectfully submits that “applicant has the burden of showing that the introduction of additional steps or components would materially change the characteristics of applicant's invention”. Therefore, it is the examiner's position that methyl acetate is not a material that would materially affect the composition since appellant has not provided any evidence rebutting the examiner's position nor has appellant provided any persuasive arguments other than “it is excluded by the instant claims language”.

Lastly, the examiner points out that column 2, line 42 et seq. wherein Dobbs teaches the purpose of his inclusion of methyl acetate is to replace some of the alcohol in consumer spray formulations without lessening consumer acceptance and have a “lower potential to generate ground-level ozone”. This teaching implies one can use a mixture of ethanol and methyl acetate

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to reduce alcohol amounts to reduce the VOC of the composition while simultaneously providing an acceptable product for consumers. However, this teaching also means one can use ethanol alone.

Appellant argues that the reference does not teach or suggest a propellant system consisting essentially of about 31% 1, 1-difluoroethane and 6 % propane/isobutane as a 50/50 mixture.

In response to the above argument, the examiner points out that Dobbs teaches a mixture of propane and isobutene is preferred and “The propellant preferably comprises from about 5 to about 50 parts by weight propane and from about 50 to about 95 parts by weight isobutane.” See column 8, lines 50-55. Thus, this reads on the instantly claimed 50/50 weight ratio of propane to isobutene. Further, Dobbs teaches “If any water is present in the formulation, then the propellant system also preferably comprises, in addition to propane and butane, dimethyl ether or one of the hydrofluorocarbons (HFC) discussed above” wherein instant 1,1-difluoroethane (an HFC) is taught. See column 8, lines 55-60 and line 50. Therefore, this is a suggestion of instantly claimed isobutane, propane, and HFC.

With regard to the recitation of about 31% of 1,1-difluoroethane and about 6% propane/isobutane, Dobbs teaches the propellant in an amount of 15-45% and preferably 20-35%, which can comprise a mixture of propellants including isobutane/propane and another propellant. See column 7, lines 48-52. It should be noted that dimethyl ether and instantly claimed 1,1-difluoroethane are considered non-VOC material whereas dimethyl ether, ethanol, isobutane, and propane are considered VOC material (note column 1 of US ‘983). Thus, bearing this in mind, it is the examiner’s position that the manipulation of the concentration of the

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propellant system within the guidance provided by Dobbs is prima facie obvious to those skilled in the aerosol art. A skilled artisan would have been motivated to manipulate the specific weight percent of each component depending of on the concentration of other VOC materials, i.e. ethanol in particular.

For instance, if ethanol is used in Dobb's suggested weight percent 45% or 50%, then the composition can only have 5-10% of another VOC material (to make a 55% VOC composition). The other VOC materials taught in Dobbs is isobutane and propane. Thus, it is reasonable to ascertain that isobutane/propane mixture could only be contained in an amount of about 5-10% (to meet the required 55% VOC standard) when ethanol is used in an amount of 45% or 50%. Moreover, Dobbs if one desired to add water to the composition, then as suggested by Dobbs either dimethyl ether or an HFC is utilized in combination with isobutane/propane. Thus, the remainder of the suggested range of propellant (15-45% and preferably 20-35%) could be dimethyl ether or instantly claimed 1,1-difluoroethane. Further, a skilled artisan would have been motivated to utilize instant 1,1-difluoroethane over dimethyl ether since dimethyl ether is considered a VOC material; thus the concentration of the VOC would be above 55%. It should be further noted that RD 42268 suggests 8% isobutane/propane with the instantly claimed polymer.

Thus, it is respectfully pointed out that, "Generally, differences in concentration or temperature will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105

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USPQ 233, 235 (CCPA 1955). In instant case, the instant concentrations are considered obvious in view of the guidance provided by Dobbs and appellant has provided any evidence of unexpected results based on the instant concentration of the propellant system.

Appellant argues that conventional propellants are suggested by Dobbs; however Dobbs does not teach a high pressure, forceful spray with a desired spray particle size.

The examiner points out that the recitation, “ providing a spray pressure of about 70 psi when used in combination with a Summit SV-9297 valve...” is an intended use limitation since the claims does not require the Summit SV-9297 valve as clearly denoted by the phrase “when used in combination”. The applicant is claiming the spray composition and not the aerosol spray device comprising the Summit SV-9297 valve and the spray composition. Thus, it is the examiner’s position that since Dobbs’s teaches a similar hair spray composition, the instant composition when used in combination with the Summit SV-9297 valve, will provide the instant functional limitation. Moreover, applicant has not shown that Dobb’s composition when used with this system (Summit SV-9297 valve) does not provide the same high-pressure conditions.

Appellant has not provided any specific arguments regarding RD except that the film-polymer disclosed by RD is available commercially and the polymer is only a part of the inventive features.

The examiner points out the rejection is based on a combination of Dobbs and RD and one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

C) Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dobbs et al (6,752,983) in view of RD 422068 in further view of Chang et al (6,214,328).

Appellant has not provided any specific arguments regarding Chang et al.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section (9) above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

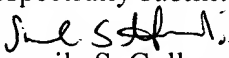
(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any

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amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

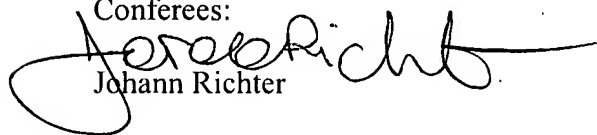
Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,


Sharmila S. Gollamudi

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

Conferees:


Johann Richter

Michael Hartley


MICHAEL G. HARTLEY
SUPERVISORY PATENT EXAMINER


Bruce M. Kisluk, Director
Technology Center 1600